Supreme Court of the United States.

No. 48.

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versus

HENRY ELLERMAN.

THOS. L. BAYNE,
for Plaintiff in Error.

Clark & Hofeline, Brief Printers, 112 Gravier Street.

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In this case the Court entered the following order: "That this case be reargued upon the question whether, 'if it be assumed that the New Orleans, Mobile and Texas Railroad Company has no right in virtue of the Act of the Legislature approved March 6th, 1869, to grant permission to vessels or steamships to land or moor at the wharves or levees for the space of three hundred and fifty feet below Calliope street, except such vessels as are immediately connected with the business of said company, in legitimately operating its railroad;' either Henry Ellerman, the complainant, or the City of New Orleans, is a proper party complainant to a bill praying for an injunction to restrain any grant of such permission, and whether the State of Louisiana is not the only party entitled to institute proceedings to restrain such transgression of the rights conferred by the Legislature. The reargument to be by printed briefs filed on or before December 20th, 1880."

Within the limits of the City of New Orleans, the east

and west banks of the Mississippi river, extend about twenty miles and on about one-third of the space, wharves or landing places for vessels, have been constructed and these are occupied partly by the city and partly by the New Orleans Elevator Company; Morgan's Louisiana Railroad Company; the New Orleans, Mobile and Texas Railroad Company; the Slaughterhouse Company; and perhaps other incorporated companies under charters and grants from the State of Louisiana.

The State has constantly exercised its sovereign power, and granted to various public corporations the use of the banks of the river and authorized wharves to be made and used by them.

Act of Louisiana Legislature No. 40, of 1868, p. 49, incorporating New Orleans Elevator and Warehouse Company.

Act No. 67, of 1869, p. 67, granting to the New Orleans, Mobile and Chattanooga Railroad Company the right to inclose and occupy a certain portion of the batture and wharves in New Orleans.

Act No 37, of 1877, p. 37, incorporating Morgan's Louisiana and Texas Railroad Company, etc.

Act No. 118, of 1869, p. 118, as to Slaughterhouse Company.

The power of the State to make such grants has been definitely decided in many cases. DeArmas vs. Mayor, 5 La. Rep., 132; 13 La. Rep., 326; 11 La. An. Rep., 55 and 148; Reynolds vs. Baldwin, 1 An. Rep., 167; Police Jury vs. Shreveport, 5 An. 661. And the matter has been definitely decided by the Supreme Court of Louisiana, be-

tween the parties to this suit, and in reference to the grant now in controversy. Ellerman vs. The New Orleans, Mobile and Texas Railroad Co., 27 An. Rep., 414. The Court say: "The public servitude along the banks of river in Louisiana is under the control of the General Assembly. Civil Code, 453, 455. The right of the General Assembly to grant the right to corporations or individuals to make and maintain wharves has long been settled. 5 An. Rep, 661; 15 An. 577; 22 An. 345; 6 New York Rep. 523; 26 New York, 287." To these may be added many other authorities.

Dillon on Municipal Corporations, vol. 1, section 69 et seq, p. 190.

Layton vs New Orleans, 12 La. An. 515.

The Legislature on granting a Charter to the City of New Orleans in 1805, reserved the right to alter the charter whenever it deemed proper. Bullard and Curry, Dig. vol. 1, p. 79, Sec. 19; 3 La. An. 305. It has exercised this right frequently, and made new charters. Such right exists in the State as sovereign.

The New Orleans, Mobile and Texas Railroad Company, was in March, 1869, and is now the owner of the land on the bank of the river, and of the batture rights within the limits, described in Act No. 67 of 1869, that is—between the street laid out between Peters street and the Mississippi river, and from Calliope street to the lower line (about three hundred and fifty-five feet below said street).

As riparian proprietor it had the right to use the bank of the river, and to construct wharves for use of its own vessels, and such other vessels as might land there, sub-

ject only to the servitude of use in favor of the public (which had been granted in above Act of the Legislature), and which is defined in articles of the Louisiana Civil Code 453, 455 and 458. It has been determined in the cases cited, that this is a public right controlled by sovereign authority.

In the case of the City of New Orleans vs. Wilmot, 31 La. An. Rep. 65, decided last year, the Supreme Court of Louisiana say: "This whole subject was considered by the Supreme Court of the United States, in Cannon vs. City of New Orleans, 20 Wallace, 577, as it has been in other cases, in that Court and in our Courts. The doctrine is plainly laid down, and it is perfectly settled, that the front proprietor, whether an individual or a municipal corporation, may construct wharves and landing places for the convenience and safety of vessels in receiving and discharging cargoes; and if the owners of such vessels choose to use such wharves and landing places, they are bound to pay reasonable compensation for such use."

This right of the front proprietor is equally recognized in all of the States of the Union. The wharves are usually held by private owners. 1 Black, Rep. 1.

Dillon on Municipal Corporations, Sec. 70.

Yates vs. Milwaukee, 10 Wallace Rep. 506.

Thus the New Orleans, Mobile and Texas Railroad Company combines in itself the rights of riparian proprietors resulting from ownership, and the rights granted by the State under Act 67 of 1869.

The Company has reconstructed its wharf, kept it in repair and occupied it, subject to responsibilities, in which

neither Ellerman nor the City of New Orleans has shared, and for which it has paid as will be seen by reference to the case of New Orleans, Mobile and C. R. R. Co. vs. Hanning, 15 Wallace Rep. 649, decided by this Court.

In the charter of this railroad company as granted by the State of Alabama, Acts of Alabama, 1866, Art. 15 of Charter, and as confirmed by the State of Louisiana, (Act of 1868, No. 28, p. 28, Sec. 1), the company was authorized "to obtain by purchase or grant from any person or corporation, and afterwards maintain, manage, use and enjoy any railroad, railroad property, and the appurtenances thereto, or any steamboats, piers, WHARVES and the appurtenances thereto, that the directors may deem necessary, profitable and convenient for the corporation to own, use and manage in connection with its railroads."

In Acts of 1869, No. 26, Sec. 15, and Act No. 67, p. 67, there is a further extension of this power to erect, construct and maintain wharves. Similar privileges are given by the State to other railroad companies, Act No. 37 of 1877, Sec. 3, p. 39.

Logically, and upon authority it would seem that as the State made the grant described in the Act of Legislature of March 6th, 1869, if there is any misuse or non use of the grant, the State is the proper party to institute proceedings "to restrain such transgression of the rights conferred by the Legislature," and that neither Ellerman nor the City of New Orleans has any such right.

In Louisiana it is held that the Attorney General is

the proper person to take proceedings against a corporation for misuse or abuse of its powers. Atchafalaya Bank vs. Dawson, 13 La. Rep., 506; the State vs. La. Savings Company, 12 La. An. Reports, 568; State of Louisiana ex rel. Lannes vs. Attorney General, 30 La. A. R. 954. And in England the practice is as stated in Mills vs. Northern Railway of Buenos Ayres Company, 5 Chancery Appeal Cases, 621 (Law Report 1869 and 1870); Vestry of Bernondsey vs. Brown, Law Reports, 1 Equity, 204; Mayor of Exeter vs. Earl of Devon, Law Reports, 10 Equity 232; Ware vs. Regents Canal Co., 3 DeG. & Jones, 212–238; (In U. S.) The State vs. Patterson & Hamburg Turnpike Co., 1 Zabriskie Rep., 9; Commonwealth vs. Farmers' Bank, 2 Grant's Cases, 392.

State vs. County Court of Saline County, 51 Missouri Rept., 350.

American Law Reports, vol. XI. p. 454.

Patterson vs. Chicago, Danville and Vincennes R. R. Co., 75 Illinois Rep., 588.

In order that we may discuss whether the complainant, Ellerman, is a proper party to a bill applying for an injunction to restrain the grant made by the State, or is entitled thereto, we must ascertain what his rights are, if he has any.

Ellerman simply purchased from the City of New Orleans, the right to collect for four years and eleven months, from the 29th of June, 1875,—that is, till *the 29th of May, 1880, a period already passed*, the right to collect certain revenues accruing from a part of the wharves of the City of New Orleans. Contract, pages 4 to 12, of Record.

By the very terms of the contract, Section 8, page 9, "the rights now held by other persons by way of lease, privilege, contract or by law," were excluded. It will be seen by the statutes referred to, that several portions of the river bank or wharves had been previously disposed of by law. Act No. 40, of 1868; Act No. 67, of 1869; No. 118, of 1869; No. 37, of 1877.

He had nothing to do with the repairing of these wharves. This duty devolved upon the Companies to which they had been granted. The keeping in repair was one of the leading considerations in the contract.

The contract is denominated as one "for building and repairing the wharves and levees according to specifications on file in the office of the Administrator of Commerce, * * and for transferring the revenues of the same," page 5.

These repairs were to be commenced within fifteen days after signing the contract. Section 11, page 10.

"The distribution of the wharves and levees as assigned for the landing of the different kinds of vessels, shall not be changed during the term of the transfer, without the consent of said transferree." Section 13, page 10. The wharves occupied by the Railroad Companies, were not embraced in this distribution.

Ellerman was to build new wharves in certain Districts of the City, if required. Section 13.

It will thus be seen that he purchased rights limited as to time *which has elapsed*, and limited as to revenues from certain portions of the wharves. He could only have the right to collect wharfage dues from such vessels

as actually used the wharves designated in his contract. The right of the City only extended to this. 6 Wallace Rep., 31; 19 Wallace, 581; 20 Wallace, 580; 5 Otto Rep. 80.

Ellerman has actually obtained an injunction restraining the Railroad Company from granting permission to any vessels or steamships to land or moor at the wharf or levee for the space of three hundred and fifty feet below Calliope street, except such vessels as are immediately connected with the business of said Company, in legitimately operating the railroad of the Company. Page 13 and 44 of Record.

The grant by the State was: "Any steamships or vessels using said wharf, by and with the consent of said Company, and not receiving cargo at, or occupying any other wharf in the City of New Orleans, shall be exempt from the payment of all levee and wharf dues to the City of New Orleans."

Neither Ellerman nor the City had any right to prevent vessels from landing at the wharves of the city; they can only charge a reasonable compensation for the use of such wharves as they may furnish. The entire basis of the claim for wharfage is some advantage, some facilty which they may furaish to vessels which actually use these. If vessels land at the railroad wharves and use them, and if the right to collect dues for such use is in Elerman or the City, they have the right to libel these vessels and make their claim; but they have no right to enjoin vessels from landing, nor to enjoin the Railroad Company from allowing them to land. A Court of Equity will allow no such abuse of its powers.

High on Injunction, Section 761 et seq.; 35 Barbour Rep. 364; 45 B. 63; Corry vs. Yartmouth, 3 Hare Rep. 593; The People vs. The Albany and New York R. R. Co., 24 New York Rep. 266; 12 Peters Rep. 91.

If the Railroad Company collects dues which belong to Ellerman or he has an adequate remedyat law to recover this money, and is not entitled to an injunction.

It is shown by the authorities which we have hereto, fore cited, that the State has the power to make the grant described in the Act of the Legislature No. 67 of 1869. This was definitely determined between these parties in reference to the above act, 27 An. Rep. 415. The terms of this grant are that the railroad company shall have "the right to *inclose and occupy* for its purposes and uses, in such manner as the directors of said company may determine, that portion of the levee-batture and wharf in the city of New Orleans, between the street laid out between Pilié street and the Mississippi river, and from Calliope street to the lower line (about three hundred and fifty-five feet below Calliope street) of the batture rights owned by said company, and no steamship or other vessel shall occupy or lie at said wharf or receive or discharge cargo thereat except by and with the consent of said company; and all steamships or vessels discharging or receiving cargo at said wharf for said company, or any steamships or vessels using said wharf by and with the consent of said company, and not receiving or discharging cargo at, or occupying any other wharf in the city of New Orleans, shall be exempt from the payment of all levee and wharf dues to the City of

New Orleans; said wharf shall be maintained *and kept in repair by said company.* That all laws and parts of laws, and all ordinances and parts of ordinances, conflicting with the provisions of this joint resolution are hereby repealed, so far as they affect the provisions of this joint resolution."

The grant was made by the State to a great public corporation for the public good of which the State as sovereign, was final judge. It is full and complete in its terms, and there is nothing on the subject matter left for Ellerman or the City of New Orleans to complain of, or which may be enjoined by them. If the railroad company does any act which would forfeit the grant, or any act requiring restraint to prevent "transgression of the right conferred by the Legislature," the State as guardian of the public interest, with which it has dealt, is the proper party to act. In this case, Ellerman has been the actor; he seeks to restrain the railroad company "from granting permission to any vessels or steampships to land or moor at the wharves or levees," etc. He makes the City of New Orleans defendant, and the City, thus unwillingly called into this litigation, answers and "denies that she is bound to warrant and defend the plaintiff against the claim of The New Orleans, Mobile and Texas Railroad Company should the claim be sustained as just and legal, and avers that the wharves were leased to plaintiff subject to all rights and privileges which might exist in favor of individuals or corporations under the laws and ordinances in force at the time of the lease," then

averring that it has an interest in the maintenance of the injunction, and praying that it be perpetuated; thereafter the city drops out from the controversy and is heard from no more either in this Court or in the Court below. The parties themselves have dealt with the city in all the proceedings in this case, as being entirely without interest. Record, p. 39–40 et seq. The only question is what rights has Ellerman as lessee and subrogee? We have shown that he was lessee for a limited time, till the 29th of May, 1880, of the right to collect revenues from vessels using such wharves as were furnished by the city, and described in his contract. He is subrogated to the rights of the city as to those wharves. He has made his contract with full notice of the fact that the railroad wharves have been disposed of by the State in favor of the riparian proprietor—which is a great public corporation exercising power under the grant in which the whole people are involved. After this grant was made neither he nor the City of New Orleans had any right to restrain the railroad company from granting permission to vessels to land or moor at the wharves or levees within the grant, nor to prohibit the company from collecting or charging any wharfage or levee dues upon any vessels landing in said space.

Ellerman has no standing before a Court of Equity to effect such restraint. There is nothing equitable in his pretensions. And he has no right to restrain vessels from landing or mooring at the wharves, nor to restrain the company from granting permission to them. He has

enjoyed during the term of his lease all that he purchased, and should not be heard in seeking to restrain others from the rights which belong to them as owner of the soil and under the grant made from the State.

THOS. L. BAYNE,
for Plaintiff in Error.

EVENING POST JOB PRINTING OFFICE, 208 B'way, N. Y.

SUPREME COURT U. S.
FILED
FEB 23 1882
JAMES H. McKENNEY

Supreme Court of the United States.

THE NEW ORLEANS, MOBILE AND TEXAS RAILROAD COMPANY,
Appellants,

vs.

HENRY ELLERMAN.

Brief as to whether the Complainant is the proper party to a bill praying an Injunction, under the Order for Reargument made by the Court.

The charter of this company, granted by the State of Alabama (Stat. of Alabama, 1866), and confirmed by Louisiana, Act, 1868, No. 28, page 28, section 1, authorizes the company to obtain by purchase, or otherwise, and afterwards maintain, use, and enjoy, any railroad, railroad property, &c., &c., or any steamboats, *piers*, *wharves*, and the appurtenances thereto deemed necessary or convenient. The Act of 1869, No. 26, section 15, and Act No. 67, page 67, contains a further extension of this power to erect, construct and maintain wharves. Such privileges are frequently given and are held by many corporations.

The State of Louisiana, Act No. 67, of 1869, page 67, granted to the New Orleans, Mobile and Chattanooga Railroad Company, of whom the present company is the successor, the

power to enclose and occupy the lands on the Mississippi river in controversy herein, which were owned by said company, for the purposes and uses of the corporation, and exempted from wharf and levee dues all vessels which should discharge or receive cargo thereat with their consent. The proofs in the case (Record, page 40), with the answers of the railroad company, and Morgan and Raynor, trustees, show that there is no controversy on these points.

The Supreme Court of Louisiana, in the suit of the City of New Orleans *vs.* the defendant herein (XXVII. La., An., page 414) decided expressly—

First.—That the act giving the company the right to enclose and occupy that portion of the riparian property on river front, which it had acquired, was valid.

Second.—That the public servitude and the right to make the grant was under control of the General Assembly.

Third.—That the State had granted the right to the riparian owner.

The charter of the company therefore authorizes it to maintain wharves and to receive emolument therefrom, and the company being the owner of the property in question bordering on the river, the State, by its grant, and the Supreme Court of Louisiana, by its decision, settle beyond controversy that the railroad company owned the property, and had the right to enclose it and erect and use wharves thereon. Such is the absolute right of the riparian owner in absence of proof to the contrary.

Dutton *vs.* Strong, 1 Black, 1.

Such being the case, and with knowledge of these facts, Henry Ellerman, a private citizen, on the 29th of June, 1875, entered into a contract with the City of New Orleans, by which he purchased or became subrogated to the rights of the city,

for the term of four years and eleven months, to rebuild and repair the public wharves of the city, or to build other wharves and levees on the public property, and to collect the rents thereof, under specific terms and conditions, set out at length in the Record (p. 8). He states in his declaration that he was subrogated thereby to all the rights of the city with reference to wharfage. To ascertain precisely what those rights were, it will be remembered that the Supreme Court of Louisiana, in the case of the City of New Orleans against Wilmot, 31 La., An. 65, decided that the State had no right to impose wharf and levee dues on vessels moored at a point within her corporate limits at which she had constructed no work and expended no money for the use and convenience of vessels; in other words, that tonnage dues or fees could not be levied on commerce generally, and that the city could only charge vessels for wharfage which used the wharves which she supplied; this court, moreover, in Cannon *vs.* the City of New Orleans, 20 Wall., 582, decided that it was a doctrine well settled and common and essential to the interests of commerce, that compensation may be charged for the use of structures erected by individual enterprise, and recognized as private property, as well as by the municipal corporation. Ellerman, therefore, purchased for a fixed term, now expired, the right to collect wharfage from vessels using wharves erected by, or demised to him, upon public property controlled by the City of New Orleans. The grant, on its face, did not pretend to be an exclusive grant of the right to collect wharfage on every vessel which might visit the port of New Orleans, and if so, would have been clearly unconstitutional.

On the contrary, the State had already granted to a number of corporations a portion of the river front, with the right to use such property so granted, and individual owners had acquired vested rights, and the grant to Ellerman was expressly subject to the rights of all these parties. Section eight of the terms and conditions under which his grant was made, ex-

pressly provides (Record, page 9), that the city only undertakes to transfer such rights as she possesses, and the purchaser takes the revenues subject to all rights now held by any other person. In other words, respecting all rights of private property, whether in persons or in corporations, the city granted to Ellerman the right to use certain public property and receive the revenues accruing from the use. Under these circumstances, having received and being in enjoyment of all that he purchased, and being in no respect deceived, and in no respect interfered with in his property, he filed his bill to restrain the railroad company from using their property for wharfage purposes, except for the purposes of their own business, and obtained an injunction against such use. In his declaration, he sets out the grant made to him by the city, and alleges that the defendants are in possession of certain property on the river front, and claimed the right to collect the wharfage thereon from vessels using the same, by way of revenue, and refers at length to the statute and charter under which this claim of right is made, and seeks to litigate the question whether the power claimed was lawfully bestowed. While it is true that he sets out his contract with the city, and alleges practically that every vessel using his wharf must pay therefor, his allegations distinctly end there, and no attempt is made to show any special right in himself to redress a public wrong, nor any grievance which he individually sustains, as distinguished from the general public, nor any serious injury which calls for the extraordinary remedy of an injunction.

The proofs in the case do not alter that condition of things (Record, p. 40). The defendant admits that complainant was the lessee, as he describes himself to be, and that they have received wharfage from vessels that did not belong to them using their wharves.

This is the state of facts under which the court has ordered a reargument upon the question whether Ellerman, the complainant, is a proper party to redress this wrong of the rail-

road company, if wrong it be. It will not be urged that a private citizen without special individual interest can file a bill and obtain an injunction enjoining a corporation from committing acts *ultra vires*, or forbidden by its charter. No volunteer can enjoin a public wrong, or one affecting the general public or the State. The action by a complainant must be founded, if it have foundation at all, on a distinct private injury suffered by him, as distinguished from a public wrong affecting the whole community. The wrong in question must be his particular private injury, specially affecting him and causing special, serious and peculiar damage, for which he can have no remedy at law or by damages.

1 High on Injunctions, § 762.

2 High on Injunctions, § 1228.

Green's, Brice's *Ultra Vires*, 2d Ed., pp. 694, 698, 702.

No principle is better settled than that private citizens cannot redress a public nuisance without showing some special injury peculiar to themselves, independent of the public wrong, and an injunction will be denied in the absence of special serious and peculiar injury, leaving the public injury to be redressed by proceedings on behalf of the public; even where it appears that injury may occur, but no evidence concerning the injury is offered, there can be no injunction, and no injunction can issue where the *consequence* or the result of the act complained of may injure the complainant. The injury must be alleged, fixed and certain.

Miss. & Mo. Co. *vs.* Ward, 2 Black, 485.

City of Georgetown *vs.* Alexandria Canal Co., 12 Pet., 91.

Byelon *vs.* Hartford Bridge Co., 14 Conn., 565.

O'Brien *vs.* Norwich & W. R. R. Co., 17 Conn., 372.

Osborne *vs.* Brooklyn City R. R. Co., 5 Blatch., 366.

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Osborne *vs.* Brooklyn City R. R. Co., 5 Blatch., 366.

Currier *vs.* West Side, &c., R. R. Co., 6 Blatch., 487.

Jones *vs.* The Mayor, 25 Ark., 301.

La. Nat. Bank *vs.* N. O., 27 La. Ann., 446.

Davis *vs.* The Mayor, 14 N. Y. R., 506.

Doolittle *vs.* Supervisors, 18 N. Y. R., 160.

Buck Mountain Coal *vs.* Navigation Co., 50 Pa. State, 91.

Mayor Liverpool, &c., *vs.* Chorley Water Works, 2 De G. M. & G., 852–860.

Stockport Dist. Works *vs.* Mayor Manchester, 9 Jur., N. S., 266.

Pudsey Coal Co. *vs.* Corporation Bradford.

Holyoke *vs.* L. & B. R. R. Co., 5 Eng. Rail. Cas., 421.

In Stockport Dist. Works *against* the Mayor of Manchester, IX. Jur., N. S., 266, defendants proposed to supply water outside their own limits, and in violation of their charter, and the complainant *being a competing* company, filed a bill to restrain them.

Lord Westbury, L. C., said : "If he had a proper party as a "rate payer, or had the Attorney-General as a party, he would not hesitate to enjoin the corporation," and added, "but here "I have a rival company ; whatever may be the general merits "of the case, the question is whether they (the public) can be "represented by that company."

In the Mayor of Liverpool *against* Chorley Water Works, II. De G. M. & G., 852–860, the defendant was empowered to

divert water by opening a channel filled with stones; and the diversion was made by a culvert.

Held, that the plaintiff, a rival company, which was entitled to the water of the stream into which the diverted stream formerly ran, was not entitled to an injunction. They had no right to complain of the particular act, and had shown no interest in preventing a violation of the law.

The court held that the complainant must have a special or private interest in confining the defendants within the limits of their powers.

In Pudsey Coal Company *vs.* Corporation of Bradford, the defendant had bought up a gas company, and begun to supply gas to an adjoining township. Complainant having a contract to supply the township, filed a bill alleging as a personal injury entitling it to an injunction, that the defendant corporation had contracted to supply gas to a company, which otherwise th y *must* have supplied, and that they were thus deprived of the profits, to their great loss.

Defendant demurred, and it was held that the injury was not such as to entitle plaintiff to maintain the suit. The court in substance held, that although as matter of fact the result of the *ultra vires* acts may have injured the complainant, that that alone would not entitle him to file a bill, unless he could show that some right which he possessed had been violated, or some duty which was owed to him by the corporation was disregarded.

In City of Georgetown *vs.* Alexandria Canal Co., 12 Pet., 94, an injunction was refused the city against the erection of a public nuisance, on the ground that the plaintiff must both aver and prove some special injury to himself, as distinguished from the general public, to maintain an action.

In Davis *vs.* The Mayor, 14 N. Y. R., 506, it was held, that although the Corporation of New York could not authorize

a corporation to maintain a railway in the public streets, and although the grant was *void*, still a suit would not lie in favor of a resident and taxpayer to whom it was not especially injurious.

This case was singularly like the present one, as after a hearing a reargument was ordered upon the question whether the plaintiffs had a standing in court, and it was held they could not maintain the action.

To the same effect is 5 Blatch. C. C., 366.
6 " 487.

And the cases to the same effect are countless.

Moreover, the particular rights possessed by the complainant, and the particular individual injury which he suffers by the act of the defendant, must appear by the bill.

City Georgetown *vs.* Alexandria Canal Co., 12 Pet., 91.

Mississippi & Mo. Co. *vs.* Ward, 2 Black, 485.

No attempt is made by the declaration, nor by the proofs in the cause, to show any individual special injury. The complainant alleges that he is the owner, by subrogation, of the rights of the city, and that the railroad company are the owners of, and are using our own property for their own purposes, but as he alleges, for purposes not authorized. He does not attempt even *to say* that the use of their property in the manner complained of lessens his revenues or affects his individual rights. He could not have maintained such a contention had he so alleged. Who could say whether the particular vessels from which the railroad company receive profit, if refused by them, would have gone to his wharves, as distinguished from the wharves of any other private individuals? Or who could say as matter of fact that the maintenance of their wharves did not increase trade at the port of New Orleans, and so benefit the complainant, and all other parties

using property on the river front? In considering, therefore, his right to appear as complainant, he must be regarded by the court simply in the position of a private citizen, carrying on a particular business, and assuming for that reason alone, to prevent this company or any other company from exercising rights on their own property of a similar character. It would not be contended seriously that a street railway company in a city could, *as such*, restrain some other street railway company from operating under an illegal franchise, nor that a person owning real estate in a city which might, perhaps, be taken for a depot, could prevent a railroad company from giving accommodation to some other company, in violation of its charter, in the depot owned by it, because the injury is remote and directly within the cases cited, but even ~~there~~ these are stronger cases than the present; the complainant here does not even allege or prove that his revenues are decreased, or that any individual right that he possesses is invaded by the acts of the defendants. He has no interest in the subject matter. He simply alleges that he is authorized to collect rents upon certain specific property, and that the defendants assume to do the same thing on property controlled by them.

The State has the right, and it is the duty and sole province of the State to restrain all corporations, public and private, from the abuse of powers granted, or from exercising those not granted. The complainant clearly cannot maintain this action. Whether, under any circumstances, the Attorney-General of Louisiana could enjoin a corporation from acts which have not occasioned any injury to any individual, or the general public, on the ground that they are technically beyond the powers granted to them, may be an interesting inquiry in legal ethics. Whether he could in this case restrain this company, the owner of the land and the owner of wharves, from letting a portion of it, or from collecting wharfage, would be a much more doubtful question, but whatever he might do for the public good, in a suit instituted for that purpose, the com-

plainant in this case cannot raise those questions, and as long as the State of Louisiana is satisfied that the alleged injuries to the general public need no redress, a private citizen may well be silent.

JOHN L. CADWALADER,
THOMAS L. BAYNE,
For Plaintiff in Error.

OFFICE SUPREME COURT U.S.
FILED
OCT 22 1880
JAMES H. McKENNEY, Clerk

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1880.

No. 48.

EDWIN D. MORGAN, JAMES O. RAYNOR, NEW ORLEANS, MOBILE AND TEXAS RAILROAD COMPANY

versus

HENRY ELLERMAN.

Appeal from Circuit Court of the United States, District of Louisiana.

BRIEF OF APPELLEE'S COUNSEL.

WM. W. KING,
ROBT. MOTT,
Solicitors for Appellee.

A W Hyatt, Print, 73 Camp St, N O—17,625.

SUPREME COURT OF THE UNITED STATES.

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versus

HENRY ELLERMAN.

Appeal from Circuit Court of the United States, District of Louisiana.

BRIEF OF APPELLEE'S COUNSEL.

On the 29th day of June, 1875, Henry Ellerman leased from the city of New Orleans, under a very onerous contract, the right to collect the revenue to be derived from the wharves and levees of the city. By the lease he assumed to pay obligations of the city, incurred for wharves and levees, of about one million of dollars, and bound himself to keep the wharves and levees in good condition, and to build other wharves when required under the stipulations of the contract. See Rec. pp. 4 to 14.

On the 5th of June, 1875, the appellants made a contract with Roberts & Witherspoon to permit them to use and employ the

wharf below Calliope street, claimed as their property, in consideration of the sum of $7200, for the term of twelve months. See Rec. pp. 40–41.

Ellerman had been subrogated by the lease to all the rights and privileges of the city of New Orleans to the revenues of the wharves and levees, and to the right to sue for them. See lease, Rec. p. 9, sec. 6. Roberts & Witherspoon commenced landing vessels at the said wharf, refusing to pay wharfage to Ellerman, and on the 11th of September, 1875, he obtained an injunction against the appellants from giving permission to any vessels to land at the said wharf, except those connected with the business of conducting and operating the legitimate business of the Railroad, and from receiving compensation therefor; and also against Roberts & Witherspoon, from landing their vessels at the said wharf. See Rec. p. 13: see Rec. p. 35, motion to dissolve; answer, Rec. p. 36; rule dismissed, Rec. p. 39

The case was tried, and the injunction perpetuated April 3d, 1877. Rec. p. 44. On the 6th of October, 1877, the appellants took an appeal from the judgment. Rec. p. 46.

The evidence is embraced in the pleadings and proceedings in the Record, and the following admissions. Rec. pp. 39–40.

AGREEMENT FILED MAY 8TH, 1876.

HENRY ELLERMAN

versus

JAMES O. RAYNOR, E. D. MORGAN AND NEW ORLEANS, MOBILE AND TEXAS RAILROAD COMPANY.

In the Circuit Court of the United States, Fifth Circuit, District of Louisiana, in an order of transfer from the Superior District Court of the Parish of Orleans.

The parties above named, being the only parties mentioned in

the petition, for the order on which, and in behalf of whom, the transfer was made, come to the following agreement, in order to facilitate the trial and avoid costs.

1st. It is admitted that when the transcript of the record from the Superior District Court was filed in the United States Circuit Court, the Judge thereof directed the case to be entered on the chancery docket of the Court, and the cause was thereafter proceeded with as one in chancery.

2d. It is admitted by the defendants that Ellerman was a lessee, as he has stated in his pleadings, and that his contract as such is properly described in the petition on file.

3d. It is admitted that the defendants legally represent the New Orleans, Mobile and Texas Railroad Company, and that the property described in the joint resolution, approved 6th March, 1869, as set forth in the pleadings, is in their possession, as stated in the answers filed by them under the said joint resolution.

4th. It is admitted that, under the authority and license of these defendants, Witherspoon, and others mentioned in the pleadings, received vessels at the aforesaid wharf mentioned in the pleadings, and received and discharged cargo thereat, without paying wharf or levee dues to the City or lessee, and that the vessels so received, and the cargo so landed or shipped, did not belong to the defendants, and that the paper filed herewith as Exhibit "A," is the license under which said parties acted.

5th. It is further admitted that these persons paid to the defendants a sum of money for the privilege of using the wharf and landing place aforesaid, as compensation for the use of the same, as will appear from the contract annexed hereto.

6th. It is further admitted that the matter in controversy is above the sum of twenty thousand dollars in value.

We agree that these admissions may be regarded as facts in the cause, to be considered in connection with the record in the

case, and that the Court may determine the questions of right as set forth in the pleadings of the parties, and that the case is submitted as upon bill, answers, and replication.

(Signed) J. A. CAMPBELL,
Defendants' Attorney.

(Signed) WM. W. KING,
Attorney for Plaintiff.

The issues involved are clearly presented in the pleadings.

Ellerman claims that his rights under the lease are legal and are vested rights; that the city had the legal right to make the lease, and seeks to enjoin the appellants from the plain violation of his rights.

The appellants contend they have the right to do the acts complained of under a grant from the State of Louisiana, made by an act of the Legislature, passed March 6th, 1869, No. 26, and as riparian proprietors.

ARGUMENT.

The wharf in controversy was a wharf situated in the city of New Orleans. The Legislature as early as the year 1836 conferred upon the city of New Orleans the exclusive right to build wharves, fix the rate of, and collect wharfage, in the city of New Orleans. This grant has been recognized, confirmed and extended so as to allow the city to lease the wharves, in every charter the Legislature has bestowed. See Acts 1836, Secs. 11 and 20, pp. 33 and 36; Acts 1870, Secs. 12, 13 and 14, p. 35; Acts 1871, Sec. 7, p. 147.

That acting upon the faith of these grants, the city at a heavy expense has built wharves for the accommodation of vessels within her limits, incurring a heavy indebtedness for the payment of which she is dependent upon the revenues of the wharves.

The wharves of the city, including those in controversy, are built on the banks of the river, in front of the levee, extend over the water and the bed of the river—the ground upon which they are built does not now, nor has it ever absolutely belonged to the front proprietors. It has at all times been subject to the public servitude, administered by the city of New Orleans.

It is the public property, and belongs to the public.

"The bed of a river is the space contained between its banks. The banks of a river are understood to be that which contains it in its ordinary state of high water. On the banks of the Mississippi River where there are levees, the levees form the banks." C. C. 457 (448).

"The bed of rivers is public property, as long as it is covered with water." C. C. 455 (444).

"Corporations of cities and towns may construct on the public places, in the beds of rivers, and on their banks, all buildings and other works necessary for public utility, for the mooring of vessels, and the discharge of their cargoes, within their respective limits." C. C. 863 (859).

The right of ownership in the land and wharves, claimed by counsel, is based upon the fact that the Railroad Company own the adjacent lands. He relies upon Article 455 of the Code. "Nevertheless the property of the banks of rivers belongs to those who possess the adjacent lands." This article does not give him a title to the land between the levee and the water edge. It has been decided that "the levees on the banks of the Mississippi being the banks of the river, the space between the levees being its bed, and the beds of rivers being public property, the property of banks of rivers belonging to those who possess the adjacent land, it follows that if the owners of the lands adjacent to the banks or levees of the Mississippi, were allowed to advance their levees further into the river, or, in other words, to advance

the banks, they would add a part of what before was the bed of the river to their property." "As long as the alluvian is not actually incorporated with the main land of the riparian owner, and that incorporation only takes place when a levee or bank separates it from the water, and as long as the bank actually remains the bank of the river, the use of both remains in the public." 18 La. 284. "The streets and banks of a river are '*loci publici*' out of commerce."

6 Rob. 350; 15 A. 657: 11 A. 148. Acts Congress, 1811, vol. 2, p. 642, sec. 3.

The banks of the rivers have belonged to the public from the earliest times. In all the grants given by the French and Spanish governments to the early settlers, a space bordering the Mississippi River for a public road, and the banks of the river was reserved. The lands were given subject to these servitudes.

The Legislature recognized this ownership in the public and not in the riparian proprietor. It made it a crime against the State "for any one, *except the corporations of cities and towns*, to receive any compensation for the landing of any embarkation before his land, or for any other use permitted by the laws of this territory, which provides that the shores of navigable rivers shall remain free for the common use of all men." This act is embodied, and re-enacted in the Revised Statutes of 1870.

Sec. 917, p. 180.

From the articles of the Code, the statutes and the authorities cited, it is clear the owner of the land fronting the river, the riparian proprietor, has no right to build wharves between the levee and the water's edge. That space is out of commerce and belongs to the public.

The corporations of cities and towns are created and exist for the public advantage, and to administer the affairs and common property of the public. The Civil Code gives to them the

general right to build wharves on the public property. Art. 863 (859).

AN ACT

Concerning the Police of the Shores of Navigable Rivers, and for other purposes.

SECTION 4. *And be it further enacted*, That any person who shall be convicted of having received any compensation for the landing of any embarkation before his land, or for any other use permitted by the laws of this territory, which provide that the shores of navigable rivers shall remain free for the common use of all men, shall, for each contravention of that kind, be fined in a sum not less than five hundred dollars; *Provided*, that the present provision shall not be applicable to the duties, which corporations of cities or towns have a right to establish in their ports.

(Signed), THOS. URQUHART,
Speaker of the House Representatives.
J. POYDRAS,
President of the Legislative Council.

Approved February 5th, 1808.
WILLIAM C. C. CLAIBORNE.
Governor of the Territory of Orleans.

See Acts 1808, p. 6; Rev. Stat. Sec. 917.

C. C. Art. 863 (859). "The corporations of cities, towns and other places may construct on the public places, in the beds of rivers, and on their banks, all buildings and other works, which may be necessary for public utility, for the mooring of vessels and the discharge of their cargoes, within the extent of their respective limits."

The State has conferred this power upon the city of New Orleans. In the charter which she bestowed upon the city when she divided her into municipalities, she vested her with the absolute control of the wharves in these words:

"That each of the aforesaid corporations shall have the exclusive right to regulate, and at their own expense make all improvements to the streets, public squares, wharves and other property," and "to fix the rate of wharfage." Acts 1836, Secs. 11 and 20, pp. 33 and 36.

In the charter of 1870, "to regulate and make improvements to the streets, public squares, wharves and other public property, and to provide for the lighting and watering of the same." Acts 1870, Secs. 12, 13 and 15, page 35.

The Act of 1871 amending the city charter, granted her the further power "to lease the wharves and landing." Acts 1871, Sec. 7, p. 147.

These grants of power by the Legislature to the city have been recognized by numerous decisions. See 30 An. 190; 20 Wallace 577; 27 A. 158; 2 A. R. 540.

The power of the Legislature to confer upon the city the exclusive right to build wharves on the public property and collect wharfage, is no longer an open question. To use the language of the Supreme Court: "the right of the General Assembly to grant the right to corporations to make and maintain wharves has long been settled." It is not in conflict with any article in the Constitution of the State. See 27 A. R. 414; 5 A. R. 661; 15 A. R. 545; 6 N. Y. 523; Ib. N. Y. 287.

It is not in conflict with any article in the Constitution of the United States.

From the earliest times in the history of Louisiana the levee and quays have been public property, reserved for the use of the public. They were so reserved on the original plans of the city as made by the King of France at its foundation, in the years 1724 and 1728. They are designated as "city properties," in an ordinance published by O'Reilly, Governor of Louisiana, on the 22d February, 1770. The administration of them belonged to the city when Louisiana was ceded to the United States. Gayarre, Spanish Dominion, vol. p. . They were not affected by the cession. "Louisiana was ceded by France to Spain, and by France to the United States, without any abridgment of the vested rights to property enjoyed by private individuals or com-

munities. The rights of the city of New Orleans were in no respect affected by this cession."

10 Peters, pp. 736 and 737.

In the case before the Court, the appellants had taken possession of the wharves and levee on the Mississippi river in front of the city, for a short distance below Calliope street, and claimed the right to collect wharfage and levee dues from vessels landing and mooring at said wharf, whether said vessels were connected with the business of the railroad company or not. It claimed the right to collect wharfage by virtue of its riparian proprietorship, and the Act of March 6, 1869. Ellerman enjoined the railroad company from charging wharfage, or granting permission to any vessel, except those connected with the business of the company, to land at the wharves of the company, on the ground that it was a divestiture of the vested rights of the city in the wharves and levees, and the revenues derived therefrom.

The appellants claimed their right under the joint resolution of 1869. In answering this position, the Court said:

"This construction of the resolution is inconsistent with the idea that the right was granted by it to the railroad company to charge wharfage dues against vessels landing at said wharf, which were in no way connected with the business of the railroad company, or that the railroad company might maintain a free wharf for such vessels."

"The Legislature granted the company the right to inclose this strip of land along the river bank, and use it, in the language of the Supreme Court 'for public purposes, to-wit: to facilitate the transaction of its business with the public.' Under this grant, the railroad company claims the right to use the wharves precisely as if they were private property of a private person, and to collect wharfage from all water craft using them, whether they have any connection with the business of the railroad com-

pany or not. This construction of the grant is clearly opposed to the views of the Supreme Court of the State. Those views are binding upon this Court, and in accordance with them I must hold the injunction in this case rightfully issued." 2 Wood, C. C. R. p. 227.

The grant given by the State long prior to the Act of 1869 was exclusive. It gave to the city of New Orleans absolute and unbounded control over the wharves and landings. It vested the city with all the powers it had to give. It exhausted its powers to give or again resume control. What is given by the Legislature cannot be resumed and then given to another without wrong, any more than any other property derived by the city from any other source. A State or individual who gives a right over a property, can no more resume it than he can seize on that which he never possessed. This is the law of justice pervading every system, every country. But when a municipal corporation, acting upon the faith of the legislative grant, as in this case, expends year by year large amounts, incurs an actual indebtedness of $762,000 for building and repairing the wharves, is compelled to look to the revenue derived from vessels for its repayments, the corporation acquires private rights, protected not only by the law of justice, but by the positive law of the land. It was upon the faith of the grant of the Legislature, that the city should have the exclusive right to build wharves and collect wharfage, that the city built wharves. Any interference with the grant, any attempt on the part of the Legislature to abrogate it in whole or in part, any attempt to confer upon others the right to build wharves, or any attempt to exempt vessels landing at any wharf in the corporate limits of the city of New Orleans for any purpose whatever, is a divestiture of the private rights of the city, null and void.

If the Legislature can take back from the city the right to build wharves within a portion of her corporate limits, and con-

fer the right upon a private corporation, she also can take back the right to build wharves and collect wharfage throughout her limits and confer them upon private individuals. The State has no such power. The city stands before this Court in the same attitude as a private individual, and the State has no more right to grant the use of her property to others, than she has to give away the property of a private citizen.

The distinction between the public rights of a municipal corporation which may be abrogated by the State at its pleasure, and the private rights of such corporation, which cannot be divested without due legal process and compensation therefor, has been clearly expressed and recognized in numerous decisions.

In the case of the New Orleans, Mobile and Chattanooga Railroad Company vs. City of New Orleans, 26 A. R. 481, the Supreme Court decided that: "A municipal corporation possesses two classes of powers, and two classes of rights, public and private. In all that relates to one class it is merely the agent of the State, and subject to its control; in the other, it is the agent of the inhabitants of the place—the corporators—maintains the character and relations of individuals, and is not subject to the absolute control of the Legislature, its creator. Among this latter class, is the right to acquire, hold and dispose of property, to sue and be sued, etc. It is true that these rights are originally derived from the Legislature; but once conferred, they are to be exercised while it exists, at the will of the corporation, in its own, and as to its own interest, for the inhabitants, just as certain rights are conferred on private corporations and persons, not *sui juris*, as minors and married women, but are not afterwards under the control of the Legislature."

Mr. Dillon says: "Over all its civil, political or governmental powers, the authority of the Legislature is, in the nature of things, supreme and without limitation, unless the limitation is found in some peculiar provision of the constitution of the par-

ticular State. But in its proprietary or private character, the theory is, that the powers are supposed not to be conferred, primarily or chiefly, from considerations connected with the government of the State at large, but for the private advantage of the particular corporation as a distinct legal personality; and as to such powers, and to property acquired thereunder, and contracts made with reference thereto, the corporation is to be regarded as *quo ad hoc*, a private corporation, or at least not public, in the sense that the power of the Legislature over it is omnipotent." Dillon on M. C., § 39, p. 83.

Mr. Cooley says: "The rule upon the subject, we take to be this: Where corporate powers are conferred, there is an implied compact between the State and the corporators, that the property which they are given the capacity to acquire for corporate purposes under their charter, shall not be taken from them and appropriated to other uses. If the State grants property to the corporation, the grant is an *executive* contract which cannot be revoked. The rights acquired, either by such grants or by any other legitimate mode in which such a corporation can acquire property, are vested rights, and cannot be taken away." Cooley's Const. Lim. page 238.

In 29 Vermont, page 12, it was said: "But while the legislative power (to enlarge, restrain or even destroy municipal corporations as the public interests may require), may be exercised over public and municipal corporations, it has uniformly been held that towns and other public corporations may have private rights and interest, vested in them under their charter; and, as to those rights, they are to be regarded and protected, the same as if they were the rights and interests of individuals or private corporations."

In the Dartmouth College case, 4 Wheaton, page 694, Mr. Justice Story says: "But it will hardly be contended that even in respect to such corporators, the legislative power is so trans-

cendant that it may at its will take away the private property of the corporation, or change the uses of its private funds acquired under the public faith." See, also, 4 Wheaton, 570-580; 6 Cranch, p. 43; 18 California R. p. 590; 10 Peters, p. 720.

In Ellerman vs. McMains et al., 30 A. R. p. 190, plaintiff claimed wharfage from the steamboat Martha. Defendants claimed exemption from liability under an act of the Legislature of 1874, wherein it is enacted that any steamboat or other water craft, wholly built in the State of Louisiana, of more than one hundred tons measurement, shall not pay to any corporation fees for wharfage. Plaintiff alleged the unconstitutionality of the act; that it divested the city of her vested rights without legal process and without compensation. The Court so decided. It said: "The exclusive right to regulate and make improvements to the wharves, and to lease them, having been thus lawfully conferred upon and delegated to the city, it became the private right of the corporation and not subject to divestiture without due legal process and compensation therefor, as contradistinguished from a public right which may be abrogated by the State at its pleasure. The right to acquire, hold, dispose of property, though originally derived by a corporation from the Legislature, is not subject to the absolute control of that body." "The Act of 1874, was a partial revocation of the grant previously made to the city, and was not within the power of the Legislature to make, for if it could revoke the grant as to vessels of over a hundred tons that were built in a particular place, it could revoke it as to vessels of any tonnage that were built at any place, and thus the Legislature would effect the divestiture of a vested right."

This identical wharf cannot be separated from the wharves of the city and treated as a separate isolated wharf. It, in common with all the wharves of the city, is built upon the public servitude. The entire line of wharves on the river front, within the corporate limits of the city, must be considered as one wharf

under her control. The revenue to be derived from the whole is absolutely necessary to enable the city to furnish sufficient accommodation for the tonnage arriving at this port. If the charges for the use of any particular wharf was proportioned so as to build and keep it in repair, it would violate the law requiring the city to impose an equal and uniform rate of wharfage, and either destroy one-half of the wharves of the city or be a burden too great for vessels to bear. The wharves in one locality are destroyed every year. If vessels landing at those wharves were compelled to pay wharfage, sufficient to enable the city to rebuild them every year, the amount paid by the vessels for wharfage would be nearly as much as the vessels are worth. In another locality the wharves are seldom destroyed, and the costs of keeping them in repair is small. If vessels were charged simply an amount sufficient to pay that expense, it would be a mere trifle compared to the value of the vessel. It would destroy the entire wharfage system, for it is only by levying a uniform rate of wharfage, and treating the entire corporate limits of the city as one wharf, that the city is enabled to derive a revenue, sufficient to provide wharves for the benefit of commerce.

The appellants base the rights of the Railroad Company upon the joint resolution of the Legislature of March 6th, 1869:

A JOINT RESOLUTION

In relation to the New Orleans, Mobile and Chattanooga Railroad Company, a corporation of the State of Alabama.

Be it resolved by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened, That there be, and is hereby granted to the New Orleans, Mobile and Chattanooga Railroad Company, a corporation of the State of Alabama, the right to inclose and occupy for its purposes and uses, in such manner as the directors of said Company may determine, that portion of the levee batture and wharf in the city of New Orleans between the street laid out between Pilié street and the Mississippi River, and from Calliope street to the lower line (about three hundred and fifty-five feet below Calliope street), of the batture rights owned by said Company, and no steamship or other vessel shall occupy or lie at said wharf, or receive or dis-

charge cargo thereat, except by and with the consent of said Company; and all steamships or vessels discharging or receiving cargo at said wharf for said Company, or any steamships or vessels using said wharf by and with the consent of said Company, and not receiving or discharging cargo at, or occupying any other wharf in the city of New Orleans, shall be exempt from the payment of all levee and wharf dues to the city of New Orleans; said wharf shall be maintained and kept in repair by said Company.

Be it further resolved, etc., That all laws and parts of laws, and all ordinances and parts of ordinances conflicting with the provisions of this joint resolution, are hereby repealed, so far as they affect the provisions of this joint resolution.

Be it further enacted, etc., That this joint resolution shall take effect from and after its passage.

(Signed), CHAS. W. LOWELL,
Speaker of the House of Representatives.

(Signed), OSCAR J. DUNN,
Lieutenant Governor and President of the Senate.

Approved March 6, 1869.

H. C. WARMOTH,
Governor of the State of Louisiana.

A true copy:

GEO. E. BOVEE,
Secretary of State.

It will be seen that the terms of that resolution, literally construed, bestow upon the Railroad Company the absolute ownership of the property, and we understand the appellants to so contend. The State could not confer greater rights than she possessed. From the authorities previously cited, the property was a "*locus publicus*," and could be the property of no one. There was on it a perpetual public servitude.

"Attempt is also made to justify the acts of the respondents, as grantees of the State, upon the ground that the complainant, in dedicating the premises to the public as a street, levee and landing, parted with all his title to the same, and that the entire title vested in fee in the State. Respondents rely for that purpose upon the statute of the Territory of Wisconsin, which was then in force in the Territory of Minnesota.

"Suppose the construction of that provision, as assumed by

the respondents, is correct, it is no defense to the suit, because it is nevertheless true, that the municipal corporation took the title in trust, impliedly, if not expressly designated by the acts of the party in making the dedication. They could not, nor could the State convey to the respondents any right to disregard the trust or to appropriate the premises to any purpose which would render valueless the adjoining real estate of the complainant." Railroad Co. vs. Schumeir, 7 Wallace, p. 289.

The only question left is, who had the administration of that servitude, the city or the State?

By the ordinance of O'Riley, the administration of the servitude was conferred upon the city.

This has been declared by the Supreme Court of Louisiana to have been a vested right. Ellerman vs. McMains, 30 A. R. p. 190.

As such, it was protected by the treaty of cession of Louisiana from France to the United States. The right of the city to the administration of the public servitude has been confirmed by numerous acts of the Legislature herein previously cited.

The right to administer this servitude was never at any time in the State. She could not, therefore, confer upon the Railroad Company the rights granted by the joint resolution of 1869, neither as owner nor as administrator of the public servitude.

Besides, the Supreme Court of the State has decided the joint-resolution to be unconstitutional. New Orleans, Mobile and Chattanooga Railroad Company vs. City of New Orleans, 26 A. R. 478. Any rights founded on the joint resolution are, therefore, null and void.

The counsel for the appellants, in his brief in support of his views, refers to the case of the City of New Orleans vs. New Orleans, Mobile and Chattanooga Railroad Company, 27 A. R. p. 415.

From the report of the case, it appears it involved but a small amount, was little considered and decided very curtly.

The decision announces in general terms the control of the State over the public servitudes existing on the banks of the river. It does not, however, say that where the State had exercised all her powers on the subject, and conferred them on another, she could at will, divest that right and give it again to a private corporation.

The doctrine of the decision is overruled in many respects by the able decision of Ellerman vs. McMains, 30 A. R. p.

The decision in the first mentioned case says: "The grant is a license to a railroad company to use *its property* on the river bank for *public purposes.*" Nothing could be more erroneous than this paragraph. The idea that the Railroad Company should go to a Legislature for a license to use *its own property* for *public purposes*, is certainly a most extraordinary proceeding. Besides, we have previously shown that the banks of the river were public, and could not be the property of any one.

RIPARIAN PROPRIETOR.

The careless using of the words Riparian Proprietor, is well calculated to produce confusion in the consideration of the case. Let us inquire who is a riparian proprietor, and what are his rights as such?

Under the Spanish regime, he was one, whose title was "*frente al rio.*" Under the French, a title "*face au fleuve.*" In all such titles the public servitude on the shores of the river were specially reserved. The riparian proprietor could not certainly be regarded as having acquired that which was specially reserved.

Under articles of Civil Code, he acquired nothing more than the right of accretion, if any should be formed beyond what was required for the exercise of the public servitude for the purposes of commerce. Whether the shores advanced or receded, the

public servitude existed on them. Under these circumstances a man could never be said to be legally the owner of that on which a perpetual public servitude existed.

The rights of the riparian proprietor could only be exercised, when the public servitude ceased to be necessary for the uses of commerce. In such case, the law provides the mode in which the riparian proprietor shall proceed. Act 1853.

"Whenever the riparian owner of any property in the incorporated towns or cities in this State, is entitled to the right of accretion, and batture has been formed in front of his land, more than is necessary for public use, which the corporation withholds from him, he shall have the right to institute suit against the corporation for so much of the batture as may not be necessary for public use, and if it be determined by Court that any portion of it be not necessary for public use, it shall be decreed that the owner is entitled to the property, and shall compel the corporation to permit him to enjoy the use and ownership of such portion of it."

Rev. Stat. of La., 1870, p. 67, Sec. 318; La. Acts 1853, p. 37.

After the accretion shall have been thus established and separated from the public servitude, he can enter into possession as owner, and not before. Such are the rights of riparian proprietor. It is evident that this right is not inconsistent with the public servitude, and cannot interfere with it. It is preposterous to say that the possessor of such a right is the owner in full property of what is covered by a perpetual servitude. His rights at best are but qualified and conditional.

BATTURE.

The word Batture is often vaguely used. It is the formation of land by deposit from the river, between the levee and low water mark. Upon this the public servitude exists.

Appellants' brief erroneously assumes that the batture was,

under the joint resolution of 1869, the property of the Railroad Company. It was the subject of a perpetual public servitude. The title to it was never in the State, and therefore she could confer none on any one else.

As administrator of a public servitude, she could not confer the rights claimed by the appellants, because she had previously conferred the right of administration upon the city by a title which the Supreme Court of the State had declared was a vested right. Ellerman vs. McMains, 30 A. R. p.

EXTINGUISHMENT OF SERVITUDE.

The appellants contend the grant by the Legislature to the Railroad Company was an extinguishment of the public servitude.

This question has been effectually disposed of by frequent decisions.

In Shephard vs. Third Municipality, 6 R. R. 350, the Supreme Court say:

The city "may indeed temporarily tolerate works thereon which they deem not injurious to the rights of the public, but no permission of a council can prevent a subsequent council from putting an end to such toleration. * * * No one has a right to a permanent occupancy of the river bank." This was said in reference to the powers of the city, which had the undoubted right of the administration of the public servitude. If the city could not do this, much less could the State.

No rights can be acquired by possession or prescription against the public servitude existing on the banks of the river.

Delord vs. New Orleans, 11 A. R. 639.
Kennedy vs. New Orleans, 10 A. R. 54.
Remy vs. New Orleans, 11 A. R. 148.

The closing paragraph of appellants' brief embraces nothing

but assertions of facts, not warranted by any evidence in the record.

As for improvements made on a mud flat which rendered it "habitable," there is no evidence of such improvements or their value, and it is scarcely possible that batture covered half the year by water, could be habitable. As for the wharf, the very joint resolution of March, 1869, under which the appellants mainly claim their rights, shows there was a *wharf* there when it was passed.

We, therefore, respectfully submit the judgment of the Circuit Court should be affirmed.

WM. W. KING.
ROBT. MOTT,
Solicitors for Appellee.

26 An. 476
517

Supreme Court of the United States.

October Term, 1880.

N. O., MOBILE, AND TEXAS R.R. CO. *et al.*
APPELLANTS,
vs.
HENRY ELLERMAN.
No. 48.

BRIEF ON ORDER FOR REARGUMENT.

The point suggested for reargument is equivalent to a general demurrer to the plaintiff's bill. The objection is, that neither Ellerman nor the city of New Orleans has any cause of action. In other words, that the State of Louisiana is the only party entitled to institute proceeding to restrain the transgression of a *private* law of Louisiana by the defendant railroad company.

Ellerman's suit was brought originally in a State court of Louisiana of competent jurisdiction. It is therefore a Louisiana case, and so far as the city of New Orleans, the State of Louisiana, and the people of this State are concerned, it is primarily governed by the laws and the procedure of Louisiana as found in her constitution, her code, her code of practice, and her statutes. Should any Federal question be involved, then and then only would the Federal jurisprudence dominate the State jurisprudence.

But in Louisiana no such division as "at law or in equity" is known, whereas in the Federal courts the distinction between law and equity is rigidly maintained. Whilst the common conscience of the people of the various States exhibits, in its daily-increasing manifestations by legislation, the tendency to abolish this distinction, yet, in the Federal courts, the resistance to this tendency is equally manifest. To the true jurist, it is a matter of the greatest interest to observe, in the workings of this antagonism, how often substantial justice is sacrificed to naked form.

Here the lower judge decided that the case presented by Ellerman for adjudication was AN EQUITY CASE; as such he tried and disposed of it; as such it was appealed from, and it has been so treated ever since.

Still, we think it controlled by the laws of Louisiana, and in this view we proceed to treat it. Your Honors exercise appellate jurisdiction over it, as the necessary result of an admission of fact (Record, p. 40) "that the matter in con-" troversy is above the sum of $20,000 in value."

Ellerman, if he loses this suit, will lose $20,000; if the railroad loses the suit, it will lose $20,000. What is predicated of Ellerman may be predicated of the city of New Orleans, for Ellerman stands almost exactly in the shoes of the city by force of his contract relative to the wharves, as well as by the terms—"*either, or*"—of the proposition to be argued.

Now, in Louisiana, he who has the real interest in the suit is the proper person to bring it. "An action can only be " brought by one having a real and actual interest which he " pursues, but as soon as that interest arises, he may bring " his action."

Code of Practice, Article 15.

Ellerman is clearly the proper party plaintiff herein, tested

by this article. The State of Louisiana parted with all its interest in the wharves and wharfage of the city of New Orleans by gift to the city. The State revoked that gift for only 355 feet of the levee front, and gave it to the railroad on certain terms and conditions. The State has, therefore, no *pecuniary* interest whatever in the result of this suit. So, for a valuable consideration, the city of New Orleans has transferred all its rights, *pro tempore*, to Ellerman, except so far as its police power is concerned. The city's interest is manifest, but remote and expectatory, on the termination of its lease to Ellerman. If, under Louisiana law, either the State or the city had brought the present suit, there would have been no proper action for want of the sole interested party before the court. Had either the State or the city sued, it would have been for the use and benefit of Ellerman. In such a suit, Ellerman would have been the real plaintiff, of whom the court and defendant are bound to take notice. In such an action, defendant may urge any defence he may have against the nominal or real plaintiff.

Davis *vs.* Taylor, 4 Martin's N. S., 135.
Dayton *vs.* Bank, 6 Rob., (La.,) 17.

Ellerman's action sounds in damages. He prays for an injunction to restrain the railroad company from doing repeated continuous injuries to him; *i. e.*, *without right*, and *with fault*, carrying on *the business of wharfingers*. "Every "act whatever of man that causes damage to another obliges "him by whose fault it happened to repair it," is the Article 2315 of the Louisiana Code of 1870. Hence, generally, the injured party is the proper one to sue, and to restrain the continuous commission of these illegal and faulty acts by an injunction.

Dudley *vs.* Tilton, 14 La. Ann., 283, and authorities.
Bruning *vs.* Canal Bank, 12 Ib., 541.

Can it be gravely contended in the face of these laws and authorities that the case is one calling for State intervention? And that, in a suit where the State is without a vestige of direct or remote pecuniary interest, she is the only party that can sue for damages for a wrongful act?

See also Article La. Code of Practice, 303: "Besides "the cases above mentioned, courts of justice may grant in- "junctions in all other cases when it is necessary to preserve "the property in dispute during the pendency of the action, "and to prevent one of the parties during the continuance "of the suit from dilapidating the same, or *from doing* "*some other act injurious to the other party.*"

Two other decided cases will satisfactorily convey to the mind the spirit of the jurisprudence of Louisiana in regard to the proper parties to a suit:

"Parties should vindicate their rights of property in their "own names and persons, and not under cover of simulated "titles."

Shadburne *vs.* Amonett, 7 La. An., 89.

"The use of the government's name, with all its privil- "eges, in prosecuting individuals for the benefit of others "will not be tolerated."

United States *vs.* Union Bank, 8 La. Annual, 388.

This principle was directly affirmed in United States *vs.* Throckmorton, (98 U. S., 70.)

II.

But though the point be thus, as we think, very clear under Louisiana law, it is certainly no less clear under two decisions at least of this honorable court, on the faith of which, doubtless, this case was ruled in the court below.

The principle (equitable or legal?) is thus laid down: "Where "a corporation, like a railroad company, has granted to it "by charter a franchise intended in large measure to be ex- "ercised for the public good, the due performance of those "functions being the consideration of the public grant, any "contract which disables the corporation from performing "those functions; which undertakes, without the consent of "the State, to transfer to others the rights and powers con- "ferred by the charter, and to relieve the grantees of the "burden it imposes, is a violation of the contract with the "State, and *is void as against public policy.*"

Now, it is just such a contract the performance of which Ellerman is enjoining. It is, in the words of the common lawyers, a contract "*utterly void*"—that is, "*not voidable*," in the same dialect. Any one injured by its performance may sue to have its nullity judicially declared. The Attorney-General of Louisiana might be politely requested to institute, in the name of the State, such a suit by a person injured, but we are quite inclined to think he would as politely decline.

The court continues: "This doctrine is asserted with re- "markable clearness in the opinion of this court delivered "by Mr. Justice Campbell in Railroad *vs.* Winans, 17 "How., 30."

See Thomas *vs.* Railroad, 11 Otto, 71.

The Winans case was decided twenty-five years ago. Law and law procedure have undergone many changes in the interval. Legislation in favor of railroads similar to the joint resolution here under examination has rather increased than diminished, and day by day your Honors are asked to go farther and farther in validating it. The brief in this case on the part of the railroad is signed by the same

individual who laid down the law of this case "with remarkable clearness" in the Winans opinion.

Was it necessary, or even useful or proper, to make the State a party in either of the above-cited cases? We think not.

Every injured person *sui juris* has a right of action against another whose faulty act causes him damage. Where this faulty act is "utterly void," it contributes greatly to the force and effect of this legal action or suit.

III.

"Has a railroad company violated its charter and incurred "the liability of a dissolution by judicial decree?" is quite a different question from that presented in this record; and there is no doubt anywhere that a suit for this purpose requires the presence of the State in court, unless the corporation had ceased to exist by operation of law.

But that the State should have to appear by her attorney-general to enjoin against faulty acts inflicting injury on individuals done by the private corporations of the country [such as are presented in this case] is certainly unheard of in Louisiana, and probably in the other States of the Union. And a judge in England thus gives his opinion on this point: "In my judgment, where the matter is a mere matter "of *ultra vires*, that is, whether the managing partners of a "concern are or are not doing something outside their "charter, *act of Parliament*, or deed of settlement, there "ought to be some plain and sufficient PUBLIC MISCHIEF "shown to warrant a suit on behalf of the sovereign or the "public. It is not in my opinion sufficient to say the thing "complained of is *ultra vires*, and that it *interests the public;* "that whatever may be the nature or extent of the excess "complained of the excess should be at once stopped, so

" that bodies incorporated and established by act of Parlia-
" ment should be taught to keep within their strict lines.
" I cannot accede to any such view of *the duty* of the
" *attorney-general* or of *this court*."

Att'y-Gen. *vs.* Railroad, 11 Chan. Div., 482.

The case just quoted was appealed to H. L., and was affirmed, but not on the point above discussed. It is quoted now for its reasons and principles, not for its authority, on the point involved. Indeed, in the theory and the practice of the law the same rule seems to prevail as in the other departments of science and art: *Nec Deus intersit, nisi dignus vindice nodus.*

IV.

The juridical person, the railroad corporation, has its birth, life, and death—its becoming, existing and ending—just as a natural person. But this threefold *existence* of the corporation pertains to the State exclusively. Any question of law touching *this existence* belongs to the State and to one or more of its three departments. The corporation has its birth, life, and death mainly within the legislative department. The rights and duties of this railroad company *towards the State* and its people are still under the regulation and control of the State's legislature, whilst its rights and duties *towards individuals* in the State, under the existing State legislation, are matters pertaining strictly to the State's judiciary. By the transfer of this suit from the State court to the Federal court, none of the existing legal relations between Ellerman and the railroad are changed. They exist in all their force and integrity. What the State judiciary would have properly decided, had they passed upon the merits of the case and the proper parties to the suit, would be the standard by which your Honors

would be governed in your disposal of it. But over all questions touching *the existence* of this corporation-railroad, the State of Louisiana and her attorney-general are without a shadow of jurisdiction. With its birth, life, or death, the State of Louisiana has not the slightest connection. Its charter can neither be modified, restricted, nor forfeited by Louisiana. How far the executive of the State might appear in the Federal court to complain against this railroad corporation of Alabama, of violation of franchise, or of abuse of the comity existing between the States of this Union, we need not inquire into now. To do so would be purely supererogatory. The right contended for by Ellerman is the right of every individual to enjoin the commission of repeated faulty acts of another individual, working him injury and damage.

If the defence be that the railroad corporation has a grant from the State of the permission to so injure a citizen, to invade and destroy, or even impair, his commercial business, and, under the pretence of "RAILROADING," to carry on the entirely different business of *wharfage*, then the main question is between the private corporation and the citizen, whether or not the faulty act is legalized and authorized by the grant under the private law of the State. There has been and there can be no injunction ordered by this or any other court to restrain the legislative grant of any similar permission by the State within its own jurisdiction. The real question being, is there any grant of such permission? In this case, by the very terms of the question, the admitted fact is that the railroad company has no grant of any such permission as it claims.

The prayer for an injunction and the language of the writ is: "You are hereby commanded, enjoined, and restrained "*from charging or receiving wharfage* from vessels land- "ing at the wharves on the property in controversy, and "from permitting vessels to land there, unless necessarily

"connected with the business of conducting the railroad "now or heretofore belonging to the New Orleans, Mobile "& Texas Railroad Company."

Record, p. 29.

Injunctions against *ultra vires* acts of railroad companies are quite common suits. So, when a railroad proceeds to take land and expropriate it for a purpose for which they are not entitled to take the land, or to take part of a house only where the law obliged them to take the whole of it, the courts enjoin them, because they are "about to exercise their "powers in a manner that is oppressive, or in a manner that "is illegal." We do not find that any objection is made on the ground that the proper party to bring such a suit is the attorney-general.

Lord Auckland *vs.* Westminster Board L. R., 7. Ch., 597.

If, then, the State be a necessary party in those cases involving the existence of a private corporation or of some plain and sufficient public mischief, we find in the terms of the proposition to be argued neither of these essential elements. The sphere of action of the State in such cases is necessarily limited, though susceptible of great enlargement by the legislative power of the State. But in the absence of any legal provision vesting the exclusive control in the officers of the State of actions against private corporations for offences and quasi-offences, acts of misfeasance and non-feasance, as well as acts known under the term "*ultra vires*," we submit that the right to a personal action against the offender to recover damages resulting from the illegal or faulty act of a private corporation still remains with the injured party. This is the well-settled doctrine in regard to

municipal corporations, and it is based on reasons more strongly and directly applicable to railroad corporations.

Crumpton *vs.* Zabriskie, 11 Otto, 601–609.

The reason why Ellerman is damaged here is because he is the lessee of all the city wharves outside of the 355 feet given to the railroad; and if the latter, growing out of their own necessities, enter upon the general business of wharfingers within their 355 feet, they create a rivalry to Ellerman, and allure ships and vessels from his wharves to theirs, thereby damaging him by loss of wharfage for such ships and vessels.

All which is respectfully submitted.

DURANT & HORNOR,
Attorneys for Ellerman.

WASHINGTON, D. C., *December* 10, 1880.

IN THE

Supreme Court of the United States.

THE N. O., MOB. & TEXAS RAILROAD,
APPELLANT,

vs.

HENRY ELLERMAN.

Appeal from the U. S. Circuit Court for the District of Louisiana.

Supplemental Brief for Appellees.

The plaintiff below, alleging himself to be the transferee of the city of New Orleans, and vested with the right to collect all the wharfage due and accruing to the city of New Orleans for the wharves fronting the city on the Mississippi river, complains of the railroad company for having taken possession of 350 feet front on the Mississippi and using it, not for railroad purposes, but simply to realize revenues therefrom as wharfingers by hiring its use to sundry steamships. He prayed for and obtained an injunction, and after many proceedings, which need not be detailed, a decree was rendered by the U. S. circuit court, to which tribunal the case had been transferred from the State court, making the injunction perpetual with costs.

Rec., p. 44.

The questions reduce themselves to these:

I. What were the rights of the city of New Orleans to the batture in front of the city on the Mississippi river; there to construct warves and charge occupiers for their use?

II. When the State, on March 6, 1869, passed the joint resolution, (Stats., p. 67,) did it impair any vested right of the city?

III. What is the true meaning and extent of the act or joint resolution of 1869?

I.

The levee in front of the city, by a long series of decisions, has been declared to be the full property and in the entire ownership of those who purchased lots, squares, or grounds facing front to the river; but as the shores of all rivers were *loci publicio* (see L'a Code of 1870, arts. 455, 665) there was a *servitude on the alluvial accretions* in favor of the public existing from the moment of their formation, but which necessarily terminated when the soil became no longer necessary for public purposes, and this servitude was naturally and properly within the police power of the city of New Orleans.

After long litigations, beginning in the very origin of Louisiana as a State in the Union and continued to the present day, these principles have been moulded into a fixed rule of property, and we need only cite the first (Livingston *vs.* Heerman, 9 Martin Rep., 656–916, *et seq.*) reported case decided by the supreme court of Louisiana, and its *implied* affirmance by this court in—

New Orleans *vs.* United States, 10 Peters, 662, in which many sparks of the learning on the subject may be perceived.

The city of New Orleans has been recognized as an *imperium in imperio* in most of the constitutions of Louisiana.

See 1812, sec. 23; 1845, sec. 128; 1852, sec. 124; 1864, title 8, sec. 133; 1879, art. 253, *et seq.*
1st State Constitutions, 707, 725, 731.

The various city charters passed by the State recognize this fact, and have bestowed certain powers and authority over these alluvial lands fronting the river, which have been exercised for many years. At the time the joint resolution above alluded to was passed, the petition truly sets forth the legal relations existing between the State and the city in regard to the subject-matter of the suit.

See Admission "*Second*," Rec., p. 40.

"Prior to the act of 1805 incorporating the city, and by "that act, and by all the subsequent charters of the city, "and acts of the legislature relative thereto, the administra- "tion of the wharves and levees was entrusted to the city. "Connected with this administration was coupled a fran- "chise that the city might charge and receive a reasonable "remuneration for the expense of the facilities afforded to "commerce. That under this franchise the city expended, "out of the revenues of the corporation, very large sums on "the wharves and levees, thereby greatly facilitating and "benefiting the commerce of the country; in consequence "of which she had a vested right in the franchise and the "revenues legitimately derived from the expenditures for "the benefit of commerce."

Petition, Rec., p. 2.

Under the authority of the State of Louisiana, therefore, the city of New Orleans was bound to keep up the wharves and the levees, and the exercise of the police power of the city over the same, and in consideration therefor she had the right to charge a reasonable rate of wharfage on vessels making use thereof.

II.

But over the city of New Orleans, as a municipal corporation of Louisiana, the State, its creator, was absolutely supreme. It could annul the charter at any moment; "*sic* " *volo, sic jubeo*, that all the sovereign authority need say."

Philadelphia *vs.* Fox, 64 Penna., 180.

It is not, however, disputed that the State has these sovereign powers; nor is it claimed that the city of New Orleans has or can have any *vested* rights whatever *quo ad* the State. It is virtually, if not actually, admitted that appellants derive whatever powers they legally have from the State directly, whilst the appellee derives his rights primarily from the city, and indirectly, through the city, from the State.

The whole question in the case is thus seen to involve the exact degree of authority conferred on the appellant by the joint resolution of March 6, 1869, under which he claims.

Statutes 1869, p. 67.

It is printed in full in appellee's brief, page 14.

It is also clear that no part of the levee and wharves is involved except the particular portion carved out of the whole by the joint resolution, and that over the remainder the rights of the city of New Orleans are as alleged in the pleadings.

The law is a private law—a pure, unadulterated donation or *privilegium* conferred by the State of Louisiana upon the railroad company chartered by her sister State, Alabama.

1st. The subject-matter is "that portion of the levee, bat-
"ture, and wharf between the street laid out between Pilié
"street and the Mississippi river, and from Calliope street
"to the lower line (about 355 feet below Calliope street)
"of the batture-rights owned by said company."

2d. The right conferred is "to enclose and occupy for its
"(their) purposes and uses, in such manner as the directory
"of said company may determine," the said subject-matter.

3d. The company's duty is that "said wharf shall be main-
"tained and kept in repair" by them.

4th. That "no steamship or other vessel shall occupy or
"lie at said wharf, or receive or discharge cargo thereat ex-
"cept by and with the consent of said company."

And *fifthly*, (on which this controversy mainly turns:)

"All steamships or vessels discharging or receiving cargo
"at said wharf for said company, or any steamships or ves-
"sels using said wharf by and with the consent of the said
"company, and not receiving or discharging cargo at or oc-
"cupying any other wharf in the city of New Orleans, shall
"be *exempt from the payment of all levee and wharf dues*
"*to the city of New Orleans.*"

And the repealing clause involves *both laws and ordinances, parts and wholes*, conflicting with these provisions.

No dispute arises as to the paragraphs Nos. 1 and 2 and 3, above set forth. The subject-matter is sufficiently defined; the right to enclose and occupy for the company's purposes and uses has been exercised without objection, and the maintenance of the wharf has been preserved. (Railroad *vs.* Hanning, 15 Wall., 649.) The fourth and fifth points are controverted, and the parties to the suit occupy irreconcileable positions in regard thereto.

The construction of the appellant of the fourth clause is that the law in question authorizes the company with its consent to permit any steamship or other vessel to occupy or lie at the said wharf and there receive and discharge cargo, no matter whether the cargo received or delivered by the ship or vessel be connected with the railroad company or not; and, as a necessary consequence, if the said steamship or other vessel should occupy during her stay in port no other wharf in the city of New Orleans, she is exempt from the payment of all levee and wharf dues to the said city.

III.

The law in question, being a private act and a privilege accorded against common right, must be strictly construed. All that has been clearly and determinately conferred on and given to the company must be recognized and enforced, whilst all else must be strictly denied and prohibited.

The private law in question is unmistakable in its intention to confer a valuable right on the railroad and take it away from the city, without compensation of any kind, direct or indirect. The motives for this act do not appear, but no one can be ignorant of the amount of mendacious legislation in favor of railroads and against the rights of the people in these States for the past half century. Here we have a contract in the shape of a gift, to the prejudice of public right, and which can only be got rid of, probably, by the exercise of the right of eminent domain in the State.

The first proposition we submit, then, in the interpretation of this law is, that, in virtue of the necessarily strict construction to be given to it, the wharf in question is interdicted to all commerce except that which is carried on by and with the consent of the railroad company. Without the

consent of the company no vessel of any kind can use the wharf. This is the plain language of the statute.

But whilst the arbitrary consent of the company to the use of its wharf is admitted, this right must be declared to be *exclusively personal* to the company, and not in any way transferable, assignable, or negotiable. The right was not conferred on the company to make money out of it in all possible ways which would be open to a commercial partnership or an individual in possession of such a grant; for this would be bringing into direct competition in the matter of wharfage the city of New Orleans and the partnership or individual. The law is entirely silent on any transfer or assignment or sale of the right conferred, which the railroad company might enter into, and this right of sale or assignment could not be exercised without an express provision to this effect. The exercise of the right to the levee and wharf is identified with and inseparable from the railroad corporation. The right itself is a *quasi* monopoly, which, like a patent right, requires a special statute to authorize its assignment. From this principle we conclude that the consent of the company is *strictly personal*, and is not *contractually* susceptible of sale, transfer, and assignment. The necessary implication from the whole law is that the benefit conferred by the State must be strictly confined to the railroad company alone, as no other person, juridical or natural, is mentioned in the statute. The peculiar *qualities* of the corporation are the sole inducements for the grant—*the sole consideration*.

Lance's Appeal, (55 Penn., 16.) A railroad cannot occupy lands within the limits of their right of way for purposes not necessarily connected with the use of their franchise.

Aldrich *vs.* Drury, (8 R. I., 554.) A railroad company may use in the construction of its road, but may not sell, materials removed in the grading of the road. A corporation which un-

dertakes, without the consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden it imposes, is a violation of the contract with the State, and is *void as against public policy.*

Thomas *vs.* Railroad, 11 Otto, 83, quoting Railroad *vs.* Winans, 17 Howard, 30.

But the whole joint resolution must be read together. It is admitted that the right to enclose and occupy the batture, levee, and wharf is for the railroad corporation's own uses and purposes; that is, the uses and purposes of a railroad company. Here the sphere of purpose and use is the sphere of the regular, orderly operations of the railroad company. The steamships and vessels landing at their wharves, and receiving and delivering cargo, must be within this sphere. That, with the consent of the company, vessels might come to this wharf and land and receive cargo as at any other wharf, such cargo being disconnected entirely with the business of the railroad, is to pervert the entire meaning of the statute; it is, in fact, to radically change the meaning of it. It would, under this construction, become a law not "in re-"lation to" a railroad, but to "wharfingers and wharfage." It would be an enabling act to the railroad to enter into a commercial competition with the city of New Orleans in regard to the wharves in front of the city. All legal presumptions and inferences (*presumptiones juris*) are opposed to that construction of a contract or a law under which it would operate as a snare. We have already indicated clearly the most favorable view that can be taken of this legislation, which should continue to meet the denunciations of all honest tribunals.

Utley *vs.* Donaldson, 4 Otto, 46.

IV.

Having thus given the views most naturally arising from the consideration of the case so far as Ellerman is concerned, we turn to the reasons of the appellants in support of an opposite conclusion.

The assignments of error are—

First. No right or interest in Ellerman to sue.

Second. The decree deprives them, the appellants, of the right to enjoy, use, and dispose of the property specified in the decree, in the manner and to the extent they are and were entitled to by the constitution and laws of Louisiana.

The first assignment is untenable. The interest of the city and its assignee in the wharves and their revenues is manifest.

The second is also untenable. There is nothing to reply to on this point. The appellants simply aver over and over again that legislation gives them the rights they claim; but they make no argument in support of that position, and quote nothing from the joint resolution to sustain their rights as claimed.

Respectfully submitted.

DURANT & HORNOR,
for Appellee.

WASHINGTON, D. C., *Jan'y* 21, 1882.